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No. 755.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

W. WILLARD WIRTZ, Secretary of Labor,

v.

STEEPLETON GENERAL TIRE COMPANY, INC., and A. E. STEEPLETON.

REPLY BRIEF.

STATEMENT OF THE CASE.

The numbered sections of the "Statement" in the petition for a writ of certiorari, particularly the last of those sections, are argumentative. That "Statement" omits facts which the district court and court of appeals considered determinative in this case. That "Statement" ascribes inaccurate and unwarranted implications to the opinions of both lower courts and by use of ingenious semantic leger-de-main misconstrues those opinions.

The facts of this case are accurately stated in the findings of fact by the district court (R. 32a-37a). The determinative testimony in this case is succinctly paraphrased in the opinion of the court of appeals, 330 F. 2d

804, based upon an obviously diligent and exhaustive study of the entire, lengthy record.

The issue in this case is whether or not petitioner can obtain judicial approval of theoretical, text-book classifications of sales despite Congressional rejection of such academic criteria for sales and despite Congressional enactment of the recognition in the particular industry as the test made mandatory upon petitioner.

REASONS FOR DENYING THE WRIT.

The "clearly erroneous" rule.

Rule 52 (a) of the Federal Rules of Civil Procedure provides that findings of fact in cases tried as was the case at bar shall not be set aside unless "clearly erroneous". This rule becomes emphatic where such findings are inferences drawn from documents or from undisputed facts, **United States v. United States Gypsum Co.**, 333 U. S. 364, 394; **Commissioner v. Duberstein**, 363 U. S. 278, 291. This rule is applicable whenever such findings are adequately supported by the record, **Graver Tank and Mfg. Co. v. Linde Air Products Co.**, 339 U. S. 605, 612.

The only issue raised by the petition for a writ of certiorari in this case is the classification of retail sales as recognized in the tire industry. This is a question of fact. Senator Taft was one of the sponsors of the 1949 amendment which clarified the exemption of retailers from Fair Labor Standards Act coverage (Section 13 (a) (2) of said Act). Senator Taft described the "recognized in the particular industry" test, made mandatory upon the Wage-Hour Administrator by the 1949 amendment, as "a question of fact just as much as any other question of fact" (95 Cong. Rec. 12516).

The district court found as a fact in this case that the only sales recognized to be wholesale sales in the tire industry are sales for resale (R. 34a). The overwhelming

support in this record for this finding is indicated by the concession on page 8 of the petition for a writ of certiorari that the fundamental definition of the word "retail" as used in the tire industry is "not for resale".

The district court found as a fact in this case that sales of tires to consumers or users are recognized in the tire industry to be retail sales without regard for the use made of the tires, the quantity purchased or the price paid (R. 34a). The court of appeals, in affirming the judgment of the district court, held that the District Judge had not "made any mistake in his findings of fact", 330 F. 2d 809. The court of appeals after its exhaustive analysis of the testimony in this case held specifically that commercial or "fleet sales" and sales to governmental agencies are recognized in tire industry to be retail sales (Ibid). Testimony evidencing the recognition of retail sales in general and of "fleet sales" or commercial sales and sales to governmental agencies in the tire industry to be retail sales paraphrased or alluded to in its opinion in this case by the court of appeals may be found in the record as follows:

A. E. Steepleton, respondent R. 117a, 118a;

E. A. Hinderscheid (Firestone Tire & Rubber Co.), R. 611a, 625a, 641a;

Milan Zaveson (General Tire & Rubber Co.), R. 497a-498a;

Ted Curry (B. F. Goodrich Co.), R. 467a, 468a, 487a;

Raymond L. Davis (Goodyear Tire and Rubber Co.), R. 568a-570a, 576a;

W. W. Marsh (National Tire Dealers and Retailers Ass'n), R. 303a, 320a-324a, 353a, 872a, 878a, 887a, 889a;

Reuben E. Hedlund (Chicago Tire Dealers Ass'n; trade media publisher and writer), R. 656a-657a, 688a, 689a;

Dr. Warren W. Leigh (Dean, College of Bus. Admin., Akron Univ.), R. 428a, 429a, 434a, 459a;

Walter E. de Bruin (Counsel, Goodyear Tire & Rubber Co.), R. 281a, 289a;

Joint memo by "Big 4". Tire Companies—R. 850a, 854a-855a.

Additional testimony from one of respondents' long-time competitors is to the same effect (R. 397a, 398a, 403a), as is the testimony by a District Manager for General Tire & Rubber Company familiar with respondents' business and market (R. 414a).

The testimony by the above-mentioned witnesses as to what is recognized in the tire industry to be retail and wholesale sales was not and could not have been contradicted by either of the two college professors called by petitioner as expert witnesses in this case. As the court of appeals observed, 330 F. 2d 808, neither of petitioner's college professors cited any authority from anyone connected with the tire industry in support of the sales classification advanced by petitioner. Both of petitioner's experts advocated the sales classification that would under academic theory apply to any and all industries (R. 710a, 752a), thereby giving no effect or meaning to the statutory phrase, "as recognized in the **particular** industry" (emphasis added).

The district court's finding that all sales to users or consumers are recognized in the tire industry to be retail sales is based upon the view unanimously expressed by every witness in this case who had any experience in the tire industry. Respondents were not required to show unanimity of opinion among persons in and as well among persons who had some contacts with the tire industry to carry their burden of proof under the retail exemption; a preponderance of the whole evidence that the prescribed portion of respondents' sales were recog-

nized in the tire industry to be retail sales was sufficient. **Boisseau v. Mitchell,** 218 F. 2d 734, 739. Since the district court's classification of retail sales as recognized in the tire industry is drawn from the uncontradicted testimony about such recognition as unanimously stated by all witnesses qualified to testify to such fact who appeared in this case, that finding should not be reviewed under Rule 52 (a) of the Federal Rules of Civil Procedure, **United States v. United States Gypsum Co.,** *supra*; **Commissioner v. Duberstein,** *supra.*

No conflict between Circuits or with a decision of this Court.

The only question presented by the petition for a writ of certiorari herein is whether certain sales by the corporate respondent are recognized as retail sales in the tire industry. As the petition fully develops, the relief petitioner seeks in this case is approval of petitioner's stubborn insistence upon use of theoretical, academic or governmental definitions of retail sales supporting the "business use" test to prove what is "recognized as retail sales in the particular industry," as that phrase appears in the 1949 amendment to § 13 (a) (2) of the Fair Labor Standards Act. In the case at bar petitioner evidenced that stubborn insistence upon the well-known "business use" test as stated in the following academic or governmental definitions of "retail sales":

Petitioner's expert, Prof. Brooks:

> "Retail" for all "the retail and wholesale trades, which are of course a very large part of the field of marketing", means "those transactions where the motive of the purchaser is buying in his own personal enjoyment or satisfaction" (R. 700a).

Petitioner's expert, Prof. Moore:

> "Retail" . . . "as used by leading authorities in the fields of economics and marketing" (R. 735a),

among which are, "any of the standard texts in the field of marketing . . . the Marketing Handbook . . . the Standard Industrial Classification Manual" (R. 737a), means "sales to the ultimate consumer, not sales to anyone who might use the product," and "ultimate consumer" means, "the person who uses the product for his own personal enjoyment" (Ibid.).

Chief Judge Weick in his opinion for the Sixth Circuit Court of Appeals in this case noted that petitioner's two professors, Doctors Brooks and Moore, "cited no authority from anyone connected with the tire industry in support of their definitions or classifications" (330 F. 2d 808).

Petitioner's third expert was a Labor Department administrative analyst concerned with research and statistics (R. 763a). She helped create the sales definitions and classifications which petitioner seeks to impose upon the tire industry (R. 771a, 772a) by reference to "analogous areas of marketing" such as "the automobile industry—automobile trade, I mean, and the marketing of parts and accessories, batteries and so forth" (R. 776a) rather than recognition in the "particular" tire industry. Sales definitions or classifications offered by this research statistician and the sources cited as authority for same include:

The Bureau of the Budget's Standard Industrial Classification Manual, used to classify businesses when data about same is compiled for analytical comparisons in governmental or other statistical studies (R. 765a-766a), which defines "retail trade" to mean, inter alia, businesses "engaged in selling merchandise for personal, household, or farm consumption" (R. 767a).

1958 Census of Business, published by the Bureau of Census, which uses the above Standard Industrial Classification Manual definition (R. 769a).

Definitions of "retail" and "ultimate consumer" from various government sources (R. 770a) and from

encyclopedia or from text books in the field of marketing by Beckman and many other academics (R. 806a-817a). As emphasized in this record by petitioner these sources were selected from the writings of theorists or doctrinaires which follow and adopt the "concept of retailing" by which "**a retail sales is one in which the buyer is an ultimate consumer** . . . (whose) **motive is personal or family satisfaction stemming from the final consumption of the article being purchased** . . ." (R. 811a, 813a).

Petitioner argues that the refusal of the Sixth Circuit in this case to acquiesce in petitioner's stubborn insistence upon the "business use" test to classify retail sales conflicts with the decision of this Court in **Mitchell v. Kentucky Finance Co.**, 359 U. S. 290, with decisions by the First Circuit in **Aetna Finance Co. v. Mitchell**, 247 F. 2d 190, and **Durkin v. Casa Baldrich, Inc.**, 214 F. 2d 703, and with the Fifth Circuit decision in **Mitchell v. City Ice Co.**, 273 F. 2d 560. Examination of those cases reveals that none of same affirmatively decides the only question presented by the petition: how shall the recognition of certain sales as retail sales in a particular industry be adduced in evidence.

As a negative point of law, this Court's decision in the **Kentucky Finance Co.** case, *supra*, prohibits the petitioner's continued insistence upon the "business use" test in this case and other administration of § 13 (a) (2). As there explained, the "business use" test restricted the meaning of retail sales to include only sales "to private persons to satisfy their personal wants" (359 U. S. 293). As there held, a dissatisfied Congress, over the Administrator's objection, in 1949 did away with that restricted definition of retail and amended § 13 (a) (2) so that a transaction would qualify as retail if it did not involve resale and was recognized in the particular industry as retail (Ibid.). In disregard of and contrary to this

Court's ruling in **Kentucky Finance Co.** and other cases that Congress in 1949 forbid use of the "business use" test, the testimony by petitioner's experts referenced above plainly shows his continuing insistence upon definitions which restrict retail sales to those motivated by the purchaser's personal or family enjoyment or satisfaction. This Court and every Circuit has or would rule without conflict that petitioner may not properly adopt or apply that definition of retail sale under § 13 (a) (2) of the Fair Labor Standards Act.

Two of the cases said by petitioner to be in conflict with the Sixth Circuit's decision in this case make no ruling at all as to the source or character of evidence which shall show whether certain sales are recognized to be retail sales in a particular industry. One of these is **Durkin v. Casa Baldrich, Inc.**, *supra*. In that case the First Circuit merely noted that, whatever proof of the recognition in the particular industry may have offered, it was "far from convincing one way or another" (214 F. 2d 708), thus the First Circuit under the clearly erroneous rule refrained from reversing the trial court's finding of fact as to the recognition in the particular industry. The second of these is this Court's **Kentucky Finance Co.** decision. The above-described rule that petitioner cannot properly apply the "business use" test in a § 13 (a) (2) case, as is attempted in the case at bar, is found in that case, but no where in that case does any rule appear which would preclude proof of the recognition in a particular industry by testimony from persons having long and varied experience in the particular industry and by documents showing the implementation in the particular industry of the recognition asserted by such persons during a long period before the 1949 amendment of § 13 (a) (2).

This Court granted certiorari in **Mitchell v. Kentucky Finance Co.**, *supra*, to resolve the conflict between the Sixth Circuit's decision therein and the First Circuit's de-

cision in **Aetna Finance Co. v. Mitchell,** *supra* (359 U. S. 291). This conflict involved the "retail concept" principle which determines whether a business can qualify for exemption under § 13 (a) (2), not how a business like respondents', which does qualify, shall prove how its sales are recognized in its particular industry. Since the "retail concept" was the issue, this Court's opinion in the **Kentucky Finance Co.** case does not mention the source or probative value of whatever testimony may have therein been offered as to the recognition of this finance company's transactions in its particular industry. This Court reviewed pertinent aspects of the legislative history of the 1949 amendments of § 13 (a) (2) and concluded that exemption under that section was restricted to those businesses which qualified as retailers under "existing concepts" (359 U. S. 294). The Conference Report on the 1949 amendment is quoted in the opinion (359 U. S. 295) as designating credit companies to be one of the businesses outside the "retail concept". Based upon the "retail concept", issue this Court in the **Kentucky Finance Co.** case stated a distinction between the rights of businesses which could and businesses which could not qualify for exemption under § 13 (a) (2) in phraseology which has direct application in the case at bar. Under this distinction such businesses as respondents' tire store, which qualified as retailers under existing concepts in 1949, were entitled to prove their exemption under § 13 (a) (2) by showing the many classes of persons with which they dealt and by showing that they were thought of in their particular industry as engaged in retail business. This right to make this showing, as respondents did in the case at bar, is implicit in this Court's ruling that finance companies, among other businesses outside the retail concept, would not accomplish anything by making the same showing:

"Thus enterprises in the financial field, none of which had previously been considered to qualify for the exemp-

tion regardless of the class of persons with which they dealt, and **regardless of whether they were thought of in the financial industry as engaged in 'retail financing'**, remained unaffected by the amendment of § 13 (a) (2)" (Emphasis added). 359 U. S. 294-295.

As emphasized above, evidence showing how finance companies of a given sort "were thought of" in the financial industry was disregarded by this Court in the **Kentucky Finance Co.** case. In the case at bar the only issue posed for this Court concerns the source and other qualitative criteria for testimony showing how respondents' business and its sales are "thought of" in its particular industry. The record in the case at bar clearly and without contradiction shows that Steepleton General Tire Company is "thought of" in the tire industry as engaged in the retailing of tires; it is equally clear and similarly uncontradicted that substantially more than 75% of Steepleton General Tire Company's sales are "thought of" in the tire industry as retail sales. The proof that this is how certain sales are "thought of" in the tire industry is so overwhelming that petitioner's leading counsel at the trial of this case volunteered "There is really no issue about what the industry's position is, Your Honor" (R. 282a), and the petition in this Court at page 8 concedes the same thing according to the usage, if not the thoughts, in the tire industry. In this case petitioner seeks to have this Court ignore that recognition in this particular industry in favor of the "business use" test as found in text books or other academic sources which petitioner would uniformly apply to all industries.

The **Aetna Finance Co.** decision by the First Circuit, like this Court's decision in the **Kentucky Finance Co.** case, turns upon the same designation of "credit companies" by the Conference Report on the 1949 amendments

to § 13 (a) (2) as outside the retail concept and as well upon the weakness of the defendant's proof of the exempt status it claimed. It should be noted that the defendant in the **Aetna Finance Co.** case claimed it was exempt as a service, not as a retail establishment. The First Circuit held that the showing by the defendant that there was "some disposition" in the small loan industry to refer to small loans to individuals as "retail financing", was hardly relevant to the intended meaning of the term "service establishment" and was, in any event, contradicted by an apparently qualified government expert (274 F. 2d 193). Nowhere in this opinion does the First Circuit hold that witnesses with long experience in a given industry are not qualified to testify what sales had been recognized in that industry to be retail sales during a period commencing long before the 1949 amendment to § 13 (a) (2), as such experienced tire industry personnel did in the case at bar. Since the **Aetna Finance Co.** case determined only the defendant finance company's right to exemption as a **service** establishment, the opinion therein does not mention, much less decide or set qualitative standards governing proof of the recognition of certain sales as retail sales in a given industry by a respondent claiming exemption as a retail establishment in such industry.

The decision of the Fifth Circuit in **Mitchell v. City Ice Co.**, *supra*, is similarly extraneous to the single issue in the case at bar. In the trial court a judgment had been rendered on directed verdict for the defendant, City Ice Company; the trial court had refused to admit an Interpretative Bulletin prepared by the Wage-Hour Administrator as evidence of what is considered in the industry to be retail. On appeal by the Secretary of Labor, the appellee Ice Company not being represented by counsel before the Fifth Circuit, the trial court's exclusion of the Interpretative Bulletin was sustained. The testimony

reviewed and commented upon by the Fifth Circuit in this case included that from four industry witnesses, who supported the Ice Company's contention, and testimony from a government expert, who on cross-examination accepted a trade association publication as authoritative, although contrary to the opinion this expert had given on direct examination. The Fifth Circuit held that this case should not have been taken from the jury, that the weight to be given opinions expressed by various witnesses, including the government expert's "weakened" opinion, and the other circumstances surrounding the sales by the Ice Company constituted issues for the jury.

In the **City Ice Co.** decision the Fifth Circuit does not overrule, but expressly cites its decision in **Boisseau v. Mitchell,** 218 F. 2d 734, as expressing the view of the Fifth Circuit upon proof of what is recognized in a particular industry to be retail. In the **Boisseau** case the trial court held that the defendant had not sustained his burden of proving that his sales or services were regarded as retail in his particular industry (218 F. 2d 736); the trial court rendered judgment against defendant. The Fifth Circuit reversed after a careful review of the testimony bearing upon the recognition in the particular industry test. The government in **Boisseau** relied upon a marketing professor who testified to sales classifications taken from the Department of Commerce Census of Business, the Bureau of the Budget's Standard Industrial Classification Manual and other sources which restrict the definition of "retail" sales to mean only those "made to the ultimate consumer for personal or family use". The Fifth Circuit rejected all of same because, as it stated:

> "This, of course, is precisely the concept which Congress repudiated in passing the 1949 amendment."
>
> 218 F. 2d 738.

In contrast to the rejected "business use" test offered by the Government's marketing professor, the defendant

Boisseau offered testimony by an economics professor to show the inapplicability of theoretical classifications to the actual circumstances of defendant's business, testimony from two of defendant's competitors and from a salesman for a supplier who sold to the defendant. All witnesses for the defendant Boisseau apparently followed what the Fifth Circuit terms the general retail concept under which retail sales are "sales or services made directly to the consumer and not for resale" and under which a business is classified as retail "because of its relationship to other businesses and the people it serves" (218 F. 2d 739). This testimony in the **Boisseau** case meets exactly the same qualitative standards as does the testimony by Dr. Leigh and all the tire industry personnel in the case at bar, although the quantum of proof in the case at bar is much greater and the recognition in the tire industry, as evidenced by accounting forms, regulatory agency rulings and other documents, is shown to have continued without change from a much earlier date. In **Boisseau** the Fifth Circuit held this proof ample to carry the defendant's burden under the § 13 (a) (2) retail exemption. There is no conflict between the Fifth Circuit's reversal of the trial court in **Boisseau** and the Sixth Circuit's affirming the trial court in the case at bar on more extensive and better documented proof of the same sort. The Fifth Circuit in **Boisseau**, as expressly relied upon in its **City Ice Co.** decision, held, as the Sixth Circuit held in the case at bar, that the recognition in the particular industry test may not be implemented or administered by reference to the Census of Business, the Standard Industrial Classification Manual or the other theoretical sources relied upon by petitioner in the case at bar because those sources all state the "business use" test rejected by Congress in 1949. Nowhere in its recent decision in **Wirtz v. International Harvester Company**, 331 F. 2d 462, does the Fifth Circuit expressly or by implication reverse its acceptance of proof of recognition in a particular industry by testimony from

personnel in that industry, as it did in **Boisseau,** *supra,* and repeated by reference in the **City Ice Co.** case, *supra.* In this recent decision by the Fifth Circuit there was no occasion to rule upon qualitative characteristics, probative value or any other aspect of the testimony. The special interrogatory submitted to the jury was held to lack essential ingredients of the cause of action, constituting basic, plain and clear error requiring reversal (331 F. 2d 466). On the difference between the phrase "in the industry" and "by the industry", the Fifth Circuit noted that there is a difference (ibid), but that difference had apparently been ignored by the Secretary of Labor when his requested instruction to the jury in this case was prepared (331 F. 2d 463).

On the precise issue presented in the petition for a writ of certiorari herein, the Sixth Circuit Opinion is in full accord with the Fifth Circuit's decision in **Mitchell v. T. F. Taylor Fertilizer Works,** 233 F. 2d 284. The Secretary of Labor's proof in that case followed his apparently invariable pattern, classification of defendant's fertilizer business according to such governmental sources as the Standard Industrial Classification Manual, the Census of Manufacturers, the Census of Business and a Farm Credit Administration circular. The Secretary's expert in this case was Professor Beckman, who testified in accordance with the "business use" test that "sales of fertilizer to farmers are not retail sales where the fertilizer is purchased for farm rather than personal or household use" (233 F. 2d 287). Defendant's proof consisted of testimony from persons experienced in the fertilizer industry that defendant's business was recognized in its industry as a retail establishment, that its sales to farmers were recognized in that industry to be retail sales; it was stipulated that others in this industry would testify in the same way. The Fifth Circuit held that Professor Beckman's definition of a retail sale as one made for

household or personal use "was precisely the concept which was rejected by Congress in amending the Section," citing the **Boisseau** decision, *supra*, and quoting the pertinent part of the House Managers Statement on the 1949 amendment (233 F. 2d 288). After commenting generally that, while possibly valid for census or other purposes, Professor Beckman's definition would not be material to the application of § 13 (a) (2) unless recognized in the defendant's particular industry, and after noting specifically that Professor Beckman neither had any personal knowledge of the fertilizer industry nor any interest in acquiring such knowledge, the court held:

> "The expert believed the matter governed by general definitions, which, if Congress had so intended, could have been placed in the Act itself. The fact that Congress referred the matter to industry recognition indicates that it intended a more flexible rule, adaptable to the many various branches of industry. In the determination of what is recognized as retail in an industry, the opinion of industry members would be relevant, and the trial court did not err in basing its findings of fact upon their testimony."
>
> 233 F. 2d 288.

The Court of Appeals for the Fourth Circuit has also rejected the petitioner's continued insistence upon application of the "business use" test in § 13 (a) (2) cases, **Wirtz v. Modern Trashmoval, Inc.**, 323 F. 2d 451, cert. den. 377 U. S. 925. This was probably the last case on the only point raised by the petition herein which was published before the Sixth Circuit's decision in the case at bar. It is consistent on this point with the Sixth Circuit's decision herein and the decisions of the Fifth Circuit discussed just above. In the Fourth Circuit case the defendant, Modern Trashmoval, Inc., offered managerial personnel of three unrelated trash removal businesses who stated their opinions that "the services performed by

Modern are retail services and are so regarded by the trash removal industry in general" (323 F. 2d 463). The Secretary argued that a court cannot rely on statements of persons in business within the industry to show that a defendant's activity is recognized as retail in that particular industry. This argument was rejected by the Fourth Circuit for these reasons:

> Each of the three industry witnesses was "well-qualified to state both his personal opinion and the general opinion of persons in the industry as to what was recognized as a retail service in the industry."
>
> A review of pertinent parts of the legislative history of the 1949 amendment of § 13 (a) (2) revealed that "the only proper background for defining a retail or service establishment in a particular industry is the understanding of the people dealing in that industry as to what constitutes retail services or retail sales."
>
> 323 F. 2d 466-467.

The Secretary's expert was a college marketing professor and writer, who testified from the Standard Industrial Classification Manual and from marketing text books by Dr. Beckman (323 F. 2d 463, 467). The Fourth Circuit observed that this professor "made it abundantly clear that he was not familiar with the trash removal industry, its methods or operation, or the opinions of its practitioners" (323 F. 2d 467); that, while this professor's views might have authority in his academic field, his distinction between retail and wholesale was of no effect in a § 13 (a) (2) case, "because it was based upon the 'business use' test which can no longer be used in considering exemptions under section 13 (a) (2)" (Ibid.). The Fourth Circuit held that the opinion evidence of the three witnesses active in the particular industry was sufficient proof by the defendant of its exempt status under § 13 (a) (2).

The "basic question" in this case according to petitioner's brief is whether the recognition in the particular industry test under § 13 (a) (2) is to be determined according to "the words used in the industry" or according to "the functional characteristics of the industry and of the sale". The decisions upon this question by the First, Fifth and Sixth Circuits are then said to be in conflict. As related above, the First Circuit has not decided this question at all. In **Aetna Finance Co.** that Circuit did not reach this question; it decided that case on the more fundamental "retail concept" issue. In the **Casa Baldrich, Inc.**, case the same Circuit followed Rule 52 (a) of the Federal Rules of Civil Procedure, thus stated no qualitative criteria of its own about the evidence. The Fourth, Fifth and, in this case, the Sixth Circuits have decided this issue, but without conflict. None of them would likely accept petitioner's phrase, "the words used in the industry" as accurately stating the first alternative. Each of these Circuits would concur in the view that courts should rely upon words used by persons experienced in a particular industry when testifying as expert witnesses and when stating their opinions as to what is recognized in a particular industry to be a retail sale. Petitioner's phrase for the second alternative, "the functional characteristics of the industry and of the sale" must refer to definitions from such of the petitioner's invariable sources as Dr. Beckman's text books or the Standard Industrial Classification Manual. There would be no conflict between decisions by any Circuits on this alternative. Those sources have been and must be rejected by every Circuit to which same are or have been offered; they are consistenty recognized to state the "business use" test, which has not properly been available to petitioner in a § 13 (a) (2) case since this Court's decision in **Kentucky Finance Co.**

"Words" or "labels" are not the test applied by the Court below:

Throughout his brief petitioner reiterates a forced or twisted interpretation of the Sixth Circuit decision in this case. It is that Chief Judge Weick's opinion for that Court construes "recognition" in the particular industry to mean words or labels currently used in the industry. Petitioner's argument with this construction stems from his suspicion, expressed in his brief, that by making words "mean what they want them to mean" members of an industry "could elect not to be subject to the Act" (p. 13). Neither the petitioner's interpretation nor any grounds for his fears can be found in the opinion of the court below in this case. The opinion for the Sixth Circuit refers at one point to proof of the "customs and practices and the two fold recognition of sales in the industry for more than 20 years" (330 F. 2d 808). At another point the phrase is the "habits and practices in the tire industry," which were "not of recent origin nor were they adopted to avoid the provisions of the Act, but were traditional and existed for many years before the amendment was enacted" (330 F. 2d 809).

The last phrase quoted above from Judge Weick's opinion in this case provides petitioner with full protection against businesses which he suspects have or will adopt a word meaning or label to avoid wage-hour requirements. That same phrase complies fully with the legislative intent that when construing the 1949 amendments to § 13 (a) (2), courts would determine "what are the habits and practices in the industry" (95 Cong. Rec. 12510). It was recognized that by reliance upon the habits and practices in an industry courts would avoid giving industries the right to decide the exemption question for themselves because, "hardly an industry can be found in which the question of what is retail and what is wholesale has not been settled for years. It is a question of fact just as

much as any other question of fact" (95 Cong. Rec. 12516).

The record in this case amply supports the findings of the courts below that the same definition of a retail sale had been recognized in the tire industry long before the amendment to § 13 (a) (2) was enacted in 1949. The joint memorandum by the "Big 4" tire companies to the Wage-Hour Administrator in 1954 (R. 280a) had attached to it records of Goodyear Tire and Rubber Company starting in 1934 (R. 282a), and records of Firestone Tire and Rubber Company (R. 283a) which covered a period commencing in 1935 (R. 613a). These exhibits reflected that before 1954, "for more than twenty years the tire industry has uniformly recognized that sales for resale are wholesale, and that sales of tires to consumers are retail irrespective of the character of the purchaser, the use to which the tires will be put, the quantities purchased, or the price paid for such tires" (R. 854a-855a). The same "Big 4" memorandum (R. 849a) and a memorandum submitted to the Wage-Hour Administrator by the retail tire dealers' trade association (R. 887a-888a) both point out that the practice of classifying retail sales in this same way was recognized in the tire industry before 1934 and was followed by NRA Codes in 1934. The same definition of retail sales as recognized in the tire industry was also adopted in O. P. A. regulations during the early 1940's (R. 427a-429a, 861a, 888a-889a).

This record does not, however, support petitioner's assertion on page 8 of his brief that the two part sales classification recognized in the tire industry for so many years before 1949 was said by tire industry personnel to have come from sales tax definitions. The only tire industry witness asked about this thought that the tire dealers' definition "came first" before sales tax classifications adopted the same definition (R. 304a). Whichever came first, classifications of retail sales for purposes of sales

taxes were approved during debate of the 1949 amendments of § 13 (a) (2) as definitions by officials who "are supposed to know the difference between wholesalers and retailers" (95 Cong. Rec. 12502).

Thus the court below based its decision in this case on customs and practices in the tire industry, the recognition of which was fully documented during many years before 1949. That decision is expressed explicitly in terms of the long-standing customs and practices recognized in the tire industry, not in terms of "words" or "labels" currently in calculated use in the industry. As such the opinion below will be of no help to businesses, if any, which might act in accord with petitioner's suspicions for avoidance purposes.

Respondents are eligible for exemption under traditional concepts.

Petitioner argues at page 26 of his brief that respondents' sales of larger or specialized tires are not within the "retail concept", but concedes that their sales of tires for use on passenger cars and on local delivery trucks fall within traditional concepts of retailing. Petitioner cites no authority, and we can find none, for the proposition that a retailer, otherwise eligible under traditional concepts of retailing to prove its right to exemption under § 13 (a) (2), becomes ineligible to do so if some of its customers are engaged in commerce. Under that contention by petitioner a corner drug store would become ineligible for exemption as a retailer if it sold pharmaceuticals or supplies to a company nurse employed by a nearby plant to give first aid or other medical attention to workers in that plant. Under petitioner's contention virtually every gas station on or adjacent to any highway would be excluded from the "retail concept" by virtue of its sales to transient trucks. This contention is contrary to the expressed legislative intent when § 13

(a) (2) was amended in 1949. When first offering the recognition in the particular industry test in the House Mr. Lucas made it clear that the purpose of his proposed amendment was, in part, to make sure the Wage-Hour Administrator treated businesses such as "repair garages, filling stations, and the like 'as retailers, whether they sold to private householders or to business customers' " so long as they are regarded as retailers in their own industry (95 Cong. Rec. 11003-11004). After full debate and passage in the House and in the Senate, the 1949 amendment was described by the Conference Report as follows:

> "Under this test any sale or service, regardless of the type of customer, will have to be treated by the Administrator and courts as a retail sale or service, so long as such sale or service is recognized in the particular industry as a retail sale or service."
>
> 95 Cong. Rec. 14932.

The same Conference Report emphasized that, as to sales made to customers in a retailer's own state, under § 13 (a) (2) it is immaterial that such customers "are engaged in interstate commerce or in the production of goods for interstate commerce" (95 Cong. Rec. 14931).

Nothing in the legislative history of the 1949 amendment of § 13 (a) (2) or any other source authorizes petitioner's attempted piece-meal exclusion of a business from the "retail concept". The plain intent of the 1949 enactment was to permit every retailer who sold to any and all users or consumers of his products to qualify if he could under the recognition in the particular industry test. As noted above, the § 13 (a) (2) exemption was not to be denied to such a retailer because some of his customers were industrial or commercial users of such products. A business would properly be considered outside the "retail concept" if it "engaged in the sale and servicing of manu-

facturing machinery and manufacturing equipment used in the production of goods'' (95 Cong. Rec. 14932) because all of its customers would be manufacturers.

The petitioner's contention that part of respondents' sales should be excluded from traditional retail classification and other contentions by petitioner are based upon the erroneous assertion that respondents' tire sales to bigger businesses were in larger units or quantities at lower prices than were respondents' tire sales to small businesses or individuals. This assertion is not supported by the record. Respondents sold the same tires a few at a time for the same price to big truck lines and to individuals who owned one or two trucks (R. 250a-252a). Owners or operators of fleets typically buy tires a few at a time, first from one, then another tire store according to which vendor sells at the lowest price at a given time and offers most service (R. 118a-120a, 67a, 161a, 165a, 168a-169a, 220a-223a). At those places in this record virtually every customer of respondents called as a witness by petitioner at the hearing of this case, testified that it was respondents' service at night, on weekends or on holidays which persuaded those customers to deal with respondent. The transactions between respondents and fleet operators were not sales in large quantities at quantity discounts, but were sales of a few units when needed for immediate use by fleet operators, coupled with such services as periodic inspection, rotating, matching and pulling of tires at the customers' places of business. The same prices and the same services were available to customers of all size or type (R. 82a, 83a, 85a-86a).

CONCLUSION.

The issue in this case is whether the phrase, ''recognized as retail sales or services in the particular industry'' in § 13 (a) (2) of the Fair Labor Standards Act is to be construed and applied according to the habits and prac-

tices in the particular industry over a long period of time as expressed by persons having long and varied experience in the particular industry, or is to be construed and applied according to academic or governmental sources which classify sales and services according to the "business use" test specifically rejected in 1949 by a dissatisfied Congress.

The courts below in this case interpreted the legislative history of the 1949 amendments to § 13 (a) (2) of said Act as authorizing courts to determine how particular sales were thought of in a particular industry when construing that Section and as making the understanding of the people dealing in the particular industry as to what constitutes retail sales or retail services a proper basis upon which to decide a § 13 (a) (2) case. In reaching its decision to accept testimony from persons qualified as experts in the particular industry the Sixth Circuit Court of Appeals is in accord with decisions by the Court of Appeals for the Fifth Circuit in **Boisseau v. Mitchell**, 218 F. 2d 734, and **Mitchell v. T. F. Taylor Fertilizer Co.**, 233 F. 2d 284, and by the Court of Appeals for the Fourth Circuit in **Wirtz v. Modern Trashmoval, Inc.**, 323 F. 2d 451, cert. den. 377 U. S. 925. In refusing to apply the "business use" test in this case the courts below are in accord with this Court's decision in **Mitchell v. Kentucky Finance Co.**, 359 U. S. 290, and therefore are in accord with all Circuits.

In this case the trial court found as a fact that a sufficient part of respondents' tire sales and services are recognized as retail sales and services in the tire industry to entitle respondents to exemption under §§ 13 (a) (2) and 13 (a) (4) of said Act. The court of appeals was not convinced that the District Judge made any mistake in his findings of fact and held that his conclusions of law were correct. The trial court's findings of fact are supported by the unanimous opinion of qualified persons

having long experience at various levels and in various capacities in the tire industry as to what is and for many years before 1949 consistently had been recognized as retail sales and services in the tire industry. The circuit court herein held that such findings were not clearly erroneous. We submit that this Court should follow the same rule and deny the petition for a writ of certiorari in this case.

Respectfully submitted,

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